

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

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**UNITED STATES' OPPOSITION TO "MOTION BY  
DEFENDANT SMITH FOR DISCOVERY" (DOCKET # 51) AND  
"DEFENDANT B&H'S MOTION FOR DISCOVERY" (DOCKET # 43)**

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The United States hereby requests that the Court deny the Motion by Defendant Smith for Discovery (Docket # 51) and Defendant B&H's Motion for Discovery (Docket # 43) because all materials requested by the Defendants are either: (1) already in Defendant's possession; (2) not in the possession, custody or control of the United States; or (3) internal memoranda created by the attorneys for the United States, not subject to disclosure pursuant to Federal Rule of Criminal Procedure 16(a)(2).<sup>1</sup>

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<sup>1</sup> Defendant B&H (B&H Mot. for Leave to Join (Docket # 52)) and Defendant Martin (Martin Mot. for Leave to Join (Docket # 53)) have moved to join Motion by Defendant Smith for Discovery. Defendant Martin (Martin Mot. to Join Mots. Filed by B&H (Docket #49)) has moved to join Defendant B&H's Motion for Discovery. Should the Court grant those Motions to

**I. BACKGROUND INFORMATION AND SUMMARY OF DISCOVERY PROVIDED BY THE UNITED STATES TO DEFENDANTS**

The Indictment in this case, which charges Defendants B&H Maintenance & Construction, Inc. ("B&H"), Jon Paul Smith ("Smith"), and Landon R. Martin ("Martin") with one count of violating Section One of the Sherman Act, 15 U.S.C. § 1, by rigging bids for the construction of natural gas pipelines submitted to BP America Production Company ("BP America"), and further charges Smith with one count of witness tampering in violation of 18 U.S.C. §1512(b), was returned on March 13, 2007.

The United States has more than complied with its discovery obligations under Federal Rule of Criminal Procedure 16, its obligations to disclose evidence favorable to Defendants as required by *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Bagley*, 473 U.S. 667 (1985), and the Discovery Conference Orders (Disc. Conf. Memo. and Order (Dockets # 23, #24, and #25)), and will continue to do so.

- Significant information was provided to the Defendants well in advance of Indictment. On December 18, 2006, the United States provided Defendants with documents relating to five of the nine projects on which rigged bids were submitted to BP America by B&H and Flint Energy Services Inc. ("Flint")<sup>2</sup> as well as the names of five individuals who confirmed various aspects of the information the United States had received from Defendants' individual coconspirator,

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join, this response would also apply to those Motions.

<sup>2</sup> Flint, Defendants' corporate coconspirator, pled guilty to a criminal Information filed on July 11, 2006 (*United States v. Flint Energy Services, Inc.; and Kenneth L. Rains*, 06-CR-00264-PSF), and was sentenced to pay a \$150,000 fine. Rains, the individual coconspirator, has also pled guilty and is awaiting sentencing before Judge Blackburn.

Kenneth L. Rains ("Rains"). On January 19, 2007, the United States provided Defendants with the FBI 302 memorandum of interview of Rains, with attached documents, and FBI 302s or paralegal notes of interview for the five individuals previously identified as confirming information provided by Rains.

- On March 22, 2007, the date of the Defendants' initial appearance, the United States produced the FBI 302s of the interviews of Defendants Smith and Martin,<sup>3</sup> and the remaining FBI 302s and paralegal notes of interviews in its possession at that time. The United States also produced an index of the materials.
- Discovery Conferences were held on April 17, 2007. The United States was ordered to produce Federal Rule of Criminal Procedure 16 discovery materials to the Defendants by May 1, 2007. On April 25, 2007, exceeding its obligations under Rule 16(a), the United States produced to each of the three Defendants: three additional FBI 302s, the paralegal notes of interviews of Smith and Martin, and electronic media containing materials produced by various companies (including Flint, the corporate coconspirator, and BP America, the victim), and individuals during the course of the grand jury investigation. A copy of paper documents produced by B&H's parent company InfrastruX, was sent to the offices of B&H's counsel to be shared, as necessary, by the three Defendants.<sup>4</sup> Indexes and updated indexes were included with the production.

Therefore, Defendants' motions for additional discovery should be denied.

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<sup>3</sup> On April 25, 2007, paralegal notes of the interviews of Smith and Martin were also produced to Defendants.

<sup>4</sup> Defendant B&H had retained copies of all the documents it produced to the United States during the investigation and agreed to share those documents with its codefendants.

## **II. UNITED STATES' RESPONSE TO "MOTION BY DEFENDANT SMITH FOR DISCOVERY"**

### **A. Response to Defendant Smith's Discovery Request Number One<sup>5</sup>**

The United States has already provided the Defendants with copies of the bid documents and bid histories that Defendant Smith requests in his Discovery Request Number One (Mot. by Smith for Disc. ¶¶ 2, 3 (Docket #51)).<sup>6</sup> In addition to the documents themselves, the United States has also provided the Defendants with indexes to: the documents; the FBI 302s and paralegal notes of interviews; and the miscellaneous materials it produced to the Defendants. Bid documents submitted for the BP America projects where B&H and Flint bid against each other, including the Webb Reader project, are included in the documents produced to the Defendants. Any bid histories produced to the United States by BP America, Flint or B&H are also in the Defendants' possession. Thus, Defendant Smith's Discovery Request Number One should be denied as moot.

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<sup>5</sup> Before Defendant Smith set forth his numbered requests for discovery, he set forth a "Statement of Facts." The "facts" stated by Defendant Smith are incorrect. BP America documents, which have been produced to Defendants, show that Rockies Construction submitted bids for BP America pipeline construction projects let by BP America's Durango, Colorado branch from January 2005 until May 2005.

<sup>6</sup> Copies of the documents produced to the United States pursuant to grand jury subpoenas served upon Flint, the coconspirator, and BP America, the victim, as well as documents produced by other companies and individuals have been produced to each of the three Defendants. B&H has copies of the documents that it, and its parent, InfrastruX, produced during the investigation and has agreed to share those documents with its codefendants. Federal Rule of Criminal Procedure 16(a)(1)(E) only requires that the United States must permit the Defendants to inspect the documents, and to copy them should they so choose. Here, the United States has done more than what is required by Rule 16 and provided the copies to the Defendants.

**B. Response to Defendant Smith's Discovery Request Number Two**

The results of the internal investigation conducted by Flint into the illegal conduct of Kenneth Rains, requested in Defendant Smith's Discovery Request Number Two (Mot. by Smith for Disc. ¶ 4), is not in the possession, custody or control of the United States. To the United States' knowledge, after Flint's investigator Jeff Short, an ex-police officer from Canada, concluded his investigation he returned to Canada with his report, if indeed he made a report, and any electronically recorded interviews. The United States has not seen any report of the internal investigation, nor has it heard any electronically recorded interviews. To the United States' knowledge, the information remains in Canada. Thus, Defendant Smith's Discovery Request Number Two should be denied.

**C. Response to Defendant Smith's Discovery Request Number Three**

By means of Discovery Request Number Three (Mot. by Smith for Disc. ¶ 5), Defendant Smith seeks information the United States has regarding pressure applied by the BP America Houston office to end the one bidder relationship with Flint. To the extent that such information exists in BP America documents in the possession, custody or control of the United States, copies of those documents were provided to Defendants on April 25, 2007. The United States interviewed numerous BP America employees regarding BP America's desire to switch from sole source contracting to a competitive bid process in an effort to introduce competition into its purchase of pipeline construction work and thereby, hopefully, reduce costs and/or increase quality. That effort was thwarted by Defendants' bid rigging. Paralegal notes of the witness

interviews were produced to Defendants on March 22, 2007. Thus, Defendant Smith's Discovery Request Number Three should be denied as moot.

**D. Response to Defendant Smith's Discovery Request Number Four**

Defendant Smith's Discovery Request Number Four (Mot. by Smith for Disc. ¶ 6) asks the United States to disclose any interviews it had with Rains after Pat Kannard and Harley Temple were interviewed by the United States. The United States did not interview Rains after it conducted interviews of Kannard and Temple. Questions that arose from the interviews of Kannard and Temple were directed to Rains' attorney. Based on information provided by Rains' attorney, the United States believes that Rains denies the allegations made by Kannard and Temple. Paralegal notes of the interviews with Kannard and Temple were produced to Defendants on March 22, 2007. Thus, Defendant Smith's Discovery Request Number Four should be denied.

**E. Response to Defendant Smith's Discovery Request Number Five**

Defendant Smith's Discovery Request Number Five (Mot. by Smith for Disc. ¶ 7) seeks information in the possession of the United States regarding its investigation into illegal acts involving Rains and Jesse Huntington. To the extent that such information is in the possession, custody or control of the United States, it is to be found in documents, FBI 302s, and paralegal interview notes of witnesses, including Rains, which have already been produced to Defendants. Additionally, copies of the audit reports from Flint's internal investigation into Field Project Cost Accounting operations in Farmington, New Mexico were produced to Defendants on April 25, 2007, and are listed in the Index to Miscellaneous Documents which was produced with the

documents on that date. Thus, Defendant Smith's Discovery Request Number Five should be denied as moot.

**F. Response to Defendant Smith's Discovery Request Number Six**

Defendant Smith's Discovery Request Number Six (Mot. by Smith for Disc. ¶ 8) seeks a copy of the tape recording Jeff Kramme made of Richard Putman on December 12, 2005. A copy of this tape recording was produced to Defendants on April 25, 2007, and is listed in the Index to Miscellaneous Documents which was produced with the recording on that date. Thus, Defendant Smith's Discovery Request Number Six should be denied as moot.

**G. Response to Defendant Smith's Discovery Request Number Seven**

Defendant Smith's Discovery Request Number Seven (Mot. by Smith for Disc. ¶ 9) seeks the results of the United States' investigation into allegations outlined by former Flint employee Kristy Sikes. To the extent that information regarding these allegations is in the possession, custody or control of the United States, it is to be found in documents, FBI 302s, and paralegal interview notes of witnesses, including Sikes, which have already been produced to Defendants. Additionally, copies of the audit reports from Flint's internal investigation into Field Project Cost Accounting operations in Farmington, New Mexico were produced to Defendants on April 25, 2007, and are listed in the Index to Miscellaneous Documents which was produced with the documents on that date. Thus, Defendant Smith's Discovery Request Number Seven should be denied as moot.

**H. Response to Defendant Smith's Discovery Request Number Eight**

Defendant Smith's Discovery Request Number Eight (Mot. by Smith for Disc. ¶ 10) seeks information in the possession of the United States as to why BP America employee Stan Page was transferred from Durango, Colorado, to Texas. The United States interviewed Stan Page on February 9, 2007. Paralegal notes of that interview were produced to the Defendants on March 22, 2007. Additional information, if any, may be found in documents, FBI 302s, and paralegal interview notes of other witnesses which have already been produced to Defendants. Thus, Defendant Smith's Discovery Request Number Eight should be denied as moot.

**I. Response to Defendant Smith's Discovery Request Number Nine**

Defendant Smith's Discovery Request Number Nine (Mot. by Smith for Disc. ¶ 11) seeks information in the possession of the United States regarding the relationship between Rains and Stan Page. The United States interviewed Stan Page on February 9, 2007. Paralegal notes of that interview were produced to the Defendants on March 22, 2007. Additional information, if any, may be found in documents, FBI 302s, and paralegal interview notes of other witnesses, including Rains, which have already been produced to Defendants. Thus, Defendant Smith's Discovery Request Number Nine should be denied as moot.



**III. UNITED STATES' RESPONSE TO "DEFENDANT B&H'S REQUEST FOR DISCOVERY"**

**A. Defendant B&H's Request for Documents Relating to the Internal Investigation Conducted by Flint Energy Services, Inc. Should be Denied**

Defendant B&H requests that the United States produce all documents relating to the internal investigation conducted by Flint of the alleged bid-rigging (B&H Mot. for Disc. ¶¶ 1-4 (Docket # 43)). This investigation is referred to in paralegal notes of interviews and FBI 302s already produced to the Defendants. The details and results of the investigation are not in the possession, custody or control of the United States. As was previously discussed in response to Defendant Smith's Discovery Request Number Two, to the United States' knowledge, after Flint's investigator Jeff Short, an ex-police officer from Canada, concluded his investigation he returned to Canada with his report, if indeed he made a report, and any electronically recorded interviews. The United States has not seen any report of the internal investigation, nor has it heard any electronically recorded interviews. To the United States' knowledge, the information remains in Canada. Thus, Defendant B&H's first discovery request should be denied.

**B. Defendant B&H's Request for a Copy of the Fact Portions of the Antitrust Division's Case Recommendation Memorandum Should be Denied**

Defendant B & H (B&H Mot. for Disc. ¶¶ 5-10) requests that United States produce its case recommendation memorandum (citing to the Antitrust Division Manual, Chapter III, G.2.c., Recommending a Criminal Case) claiming, but without citing any legal support for its request, that this United States' internal memorandum is discoverable pursuant to Federal Rule of Criminal

Procedure 16(a)(1)(E)(i), documents ". . . material to preparing the defense." In fact, Defendant B&H's request is contrary to the provisions of Federal Rule of Criminal Procedure 16, and to caselaw. Therefore, Defendant B&H's request for this United States' internal memorandum should be denied.

**C. Legal Argument as to Why Defendant B&H's Request for the Case Recommendation Memorandum Should be Denied**

Federal Rule of Criminal Procedure 16(a)(2) specifically exempts internal government memoranda from disclosure:

Except as Rule 16(a)(1) provides otherwise,<sup>7</sup> this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.

This Rule is firmly grounded in the work product privilege. A parallel exemption for "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent,. . . " is set out in Federal Rule of Criminal Procedure 16(b)(2)(A).

Sixty years ago, the Supreme Court set forth the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947), and it remains the law. In *Hickman*, the petitioner sought reports and memoranda made by the attorney for the defendant. The Court denied the request, noting that release of an attorney's note or memoranda would destroy his ability to prepare for a case:

In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . .

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<sup>7</sup> Rule 16(a)(1)(F) requires the production of reports of physical or mental examinations and scientific tests. Rule 16(a)(1)(G) requires the production of expert witness reports.

That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

*Id.* at 510-511.

In *United States v. Nobles*, 422 U.S. 225 (1975), the Court held that the work product doctrine also applied in criminal cases.

Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interest of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

*Id.* at 238.

Defendants do not have "unlimited license to rummage in the files of the Department of Justice." *Alderman v. United States*, 394 U.S. 165, 185 (1969). *See also United States v. Fernandez*, 231 F.3d 1240, 1243 (9th Cir. 2000) ("the documents at issue were protected by the deliberative process and work product privileges."); *United States v. Safavian*, 233 F.R.D. 12, 20 (D.D.C. 2005) ("[T]he internal deliberative processes of the Department of Justice . . . are irrelevant to the preparation of a defense."); *United States v. Azzarelli Constr. Co.*, 459 F. Supp. 146, 152 (E.D. Ill. 1978) ("Defendants are not entitled to disclosure of internal government memoranda under Rule 16(a)(2).")

While Defendant B&H maintains it simply seeks the "facts" contained in the United States' case recommendation, the facts have been disclosed to the Defendants in the discovery already provided by the United States. The United States attorneys' understanding and organization of those facts is what is to be found in the case recommendation. Indeed, paragraph seven of

Defendant B&H's Motion for Discovery (B&H Mot. for Disc. ¶ 7) discloses the Defendant's real complaint: "the discovery contains no overarching memorandum that discloses the government's *understanding of the facts or theory of the alleged offenses*." (emphasis added) That, the Defendants are not entitled to.

The United States' case recommendation memorandum is exempt from disclosure under Federal Rule of Criminal Procedure 16(a)(2). It falls within the "zone of privacy in which a lawyer can prepare and develop legal theories and strategies 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 383-384 (2d Cir. 2002) (opinion filed 2003, decided 2002) (quoting *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998)). The Defendant is looking for a road map of the United States' case, to which it is not entitled. Thus, Defendant B&H's request for disclosure of the United States' case recommendation memorandum should be denied.

#### **IV. CONCLUSION**

Accordingly, for the reasons stated above, the Motion by Defendant Smith for Discovery (Docket # 51) and Defendant B&H's Motion for Discovery (Docket #43) should be denied. The United States has already provided generous discovery to the Defendants in this case and more than complied with the requirements of Federal Rule of Criminal Procedure 16(a). Most of the materials requested by Defendant Smith are already in his possession, and in the possession of the other Defendants. In addition, both Defendant Smith and Defendant B&H have requested material which is not in the possession, custody or control of the United States. Finally, the

United States' internal case recommendation requested by Defendant B&H is not subject to disclosure pursuant to Federal Rule of Criminal Procedure 16(a)(2).

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

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I hereby certify that on August 1, 2007 I electronically filed the foregoing United States' Opposition to "Motion by Defendant Smith for Discovery" (Docket # 51) and "Defendant B&H's Motion for Discovery" (Docket # 43) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

gjohnson@hmflaw.com

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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s/Diane Lotko-Baker

DIANE C. LOTKO-BAKER

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s/Carla M. Stern

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s/Mark D. Davis

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